



In re Estate of the Late Okwoma Keya (Deceased) (Succession Appeal 1 of 2020) [2024] KEHC 10564 (KLR) (26 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL 1 OF 2020
SC CHIRCHIR, J
AUGUST 26, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE OKWOMA KEYA (DECEASED)

BETWEEN

KEYA OKWOMA APPELLANT

AND

JOSEPH OMPACHI MAKANGA 1ST RESPONDENT

DAVID OLUSAKHA 2ND RESPONDENT

JOSEPH INYANGALA AMBANI 3RD RESPONDENT

HARON MEJA 4TH RESPONDENT

PETWE BWALA 5TH RESPONDENT

NIXON BWALA 6TH RESPONDENT

AND

ZAINAR ANYANDE NAMISI APPLICANT

RULING

1. Through the Notice of Motion dated 5th May 2023, the Applicant seeks for the following orders:-
 - 1). (spent)
 - 2). That the Applicant Zaniar Anyande namisi be allowed to replace Keya Okwoma in Butere Succession 158 of 2002 and in this Appeal and any other subsequent pleadings.



- 3). That there be a temporary injunction issued against the Respondents by themselves or other persons claiming against them from interfering with the Applicants peacefully enjoyment of the suit property herein pending the hearing of this application and Appeal.
 - 4). That the Area Chief or the OCS Butere Police station supervise the execution of any order that will be issued.
 - 5). That the cost of this application to be borne by the Appellant/ Respondent.
2. The application is supported by the affidavit of the applicant sworn on 5th May 2023 and the grounds appearing on the face of the Application.

The Applicant's Case

3. It is the Applicant's case that she is the wife of the Keya Okwoma , who is the Appellant on this Appeal ,and who has since died. She has attached a death certificate for the said Keya Okwoma and marked it as "ZAN 1"
4. She further states that she has been issued with a limited grant of letters of administration Ad litem in respect of the Estate of the late keya. A limited grant adlitem is attached to the Application and marked "ZAN 2" .
5. It is further her case that the respondents have encroached on her late husband's portion of the land ; that she has come under threats whenever she attempts to make use of her family's portion of land and she fears for her life , security and safety of her children.
6. She prays that the court issue an injunction for her own safety and that the OCS be assigned to supervise the orders issued.

The Respondent's Case

7. In his replying affidavit dated 3rd June 2023, the 1st respondent denied the allegations made by the applicant and avers that the sale of 4 acres to the 2nd to 6th respondents was upon the mutual Agreement of the Applicant's late husband and himself; that the 2nd-6th respondent had already taken actual possession of the said portion and had already planted trees ; that the succession process was simply to formalize the sale.
8. He denied the allegations by the applicant that she has been attacked by the 2nd-6th respondent, stating that he lives with them and has not witnessed any violence or threats directed at the Applicant. He avers that the activities of the respondent are within the marked boundary that had been agreed upon, and that the application for injunction was unwarranted in the circumstances.
9. The Application proceeded by way of written submissions.

Applicant's submissions

10. It is the Applicant's submission that the respondents have encroached on her portion of land and are now cultivating the 5 acres instead of the 4 acres that they had acquired. She submits that this constitutes intermeddling of the deceased's estate. Reliance has been placed in the case of *Re estate of John Mulwa Nzioki (deceased)* 2021 eKLR and *Republic vs. Chairman Machakos Land disputes Tribunal & others Ex parte Late Mutheke Ndeti & others* Machakos HCMA No. 252 of 2006.
11. She further submits that this court has powers to issue injunctive orders for purposes of preservation of the deceased's Estate. To buttress her submissions in this regard, she has relied on the case of *Edema*



¶ 2 others vs. Edema ¶ 5 others (miscellaneous succession cause E001 of 2022) KEHC 9960 (KLR) as well as the case of Re estate of Kitur Chepsungulegei (deceased) (2021) eKLR.

12. It is her prayer that the court order the respondent to maintain a status quo and not harass the applicant pending the determination of the appeal.

Respondents' Submissions

13. The Respondents have given a brief background to the present Application and submit that they are not opposed to the substitution of the deceased by the Applicant herein.
14. On the prayer for injunction, the respondent have termed the Application ambiguous and lacking on the particulars. They have queried for instance, the property which forms the subject matter of the Application; To the respondents , it is not clear if the Applicant is referring to the whole of Title no. Marama/ shikunga/ 295 , or a portion thereof. The respondents submit that the ambiguity was deliberate; and was meant to prejudice their response.
15. On the prayer for temporary injunction, the respondents submit the applicant has not satisfied the requirements for the granting of the orders of injunction such as if refusal of granting the order will render the substantive appeal nugatory.
16. The respondent further submit that allowing prayer 3 of the Application will contradict the orders of the certificate of the confirmation of the grant and that it would be like issuance of an eviction order, a move would render them homeless.

Determination

17. The main issue for determination is whether the applicant has made out a case for grant of the injunctive orders sought.
18. The law on granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the Civil Procedure Rules . It provides as follows:

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”
19. Further the Applicant must satisfy the conditions set out in the celebrated case of *Giella v Cassman Brown Co Ltd* (1973) EA 358 , that is , the Applicant must show:
 - (i) that he has a prima facie case with probability of success;
 - (ii) that he will suffer irreparable loss that cannot be adequately compensated by damages: or
 - (iii) That the balance of convenience is in his favour.



20. Further Section 47 of the *Law of Succession Act* vests the court with wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person. The section provides as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

21. In the case of *re Estate of Jeremiah Ngiri Kibati (Deceased)* [2019] eKLR and *Re Estate of Elijah Ngari (Deceased)* [2019] eKLR, the court in dealing with the issue of issuance of conservatory orders in succession matters cited with approval the decision of this court in *Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria* [2012] eKLR in which it was held that the Applicant has to satisfy the conditions that:

- “(a.) That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless Preservatory orders of inhibition are issued.
- (b.) That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.
- (c.) That the applicant has arguable case.”

22. Similarly, *In the Matter of the Estate of Paulo Kiplagat Boiwo (Deceased)* (2012) eKLR, the court while affirming that preservatory orders are similar to injunctive orders, noted that applicants have to abide by the conditions set out in the case of *Giella vs Cassman Brown* (supra) namely the applicant must make out a prima facie case and show that they will suffer irreparable loss, which loss cannot be compensated by damages and lastly that the balance of convenience should tilt in their favour where doubt exists.

23. It is the Applicant’s duty to demonstrate that she meets the conditions set out under Rule 40(1) of the *Civil Procedure Rules* and in above cited decisions.

24. The applicant has sought for an injunction to bar the respondents from interfering with her peaceful enjoyment of the suit property (Emphasis added).

The question that naturally and immediately come to mind is which suit property?

25. I have gone through the grounds appearing in the face of the Application and carefully read through the supporting Affidavit and am unable to find the identity of the suit property. The Applicant has not made any effort to relate her prayers to a particular property.

26. A perusal of the Memorandum of Appeal show that there are 2 properties that form the subject matter of the Appeal, that is Title No. Marama / Shikunga/295 and Marama / Shikunga/1189. This appear on paragraph 2 of the memorandum of Appeal. However there is nothing on ground No. 2 of the memorandum of Appeal that would make one conclude that, that was the property that the Applicant was referring to in prayer 3 of her Application.

27. For one to decipher which suit property the Applicant is referring to or a portion of which property , one has to go through the entire proceedings of the lower court.

28. I have gone through the lower proceedings and I could make a correct guess on which property the Applicant was referring to . I have also noted that the respondent’s Advocate too has painstakingly tried to figure out which property the Applicant was referring to .



29. However , it is not the work of this court or the opposite party in a suit to try and read the mind of the Applicant. It is the Applicant who moved the court and it was her duty to clearly state her prayers. I note that the Applicant is duly represented, and there is no conceivable reason why such an application, so wanting in particulars, was filed. Further even if this court was to grant prayer 3 of the Application , how will such an order, wanting of the particulars of the property being referred to, be enforced?
30. On this ground alone am inclined to dismiss this Application .
31. However , moving on to the other grounds in support of the Application, the Applicant has complained of encroachment on her portion of the property by the respondents, but there is no evidence at all that such interference has taken place. There is no evidence of the alleged cultivation , which could have been easily demonstrated by use of photographs ,for instance .
32. The Applicant has further stated that her life has been threatened and cites an incident in which a panga was brandished at her. However evidence of such an incident ,like a report filed with the police, has not been availed.
33. In a nutshell, the Applicant has failed to demonstrate that she has a premafacie case with a portability of success to warrant the orders of injunction.
34. The prayer for substitution is not opposed and is warranted in any event .
35. In conclusion I hereby proceed to make the following orders:
- a). Keya Okwoma is hereby substituted by Zainar Anyande Namisi in Butere Succession Cause No. 158 of 2002 and on this Appeal.
 - b). The prayer for injunction is hereby dismissed.
 - c). Each party to meet their own costs

DATED, SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 26TH DAY OF AUGUST 2024.

S.CHIRCHIR

JUDGE

In the presence of :

Godwin- Court Assistant

Mr. Wanyanga for the Applicant

Mr. Mogi for the 2nd to 6th Respondents.

